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**Amendment No. 1 to HB0457**

**Fowlkes  
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**AMEND Senate Bill No. 213\***

**House Bill No. 457**

by deleting all language after the enacting clause and by substituting instead the following:

SECTION 1. Tennessee Code Annotated, Section 39-14-149, is amended by deleting that section in its entirety and by substituting instead the following language:

Section 39-14-149.

(a) It is an offense for any person, knowingly and with the intent to defraud a communication service provider of any lawful compensation for providing a communication service, to:

(1) Use, make, develop, assemble, sell, distribute, possess with intent to distribute, lease, license, transfer, import into this state or offer, promote or advertise any unlawful communication device for the unauthorized acquisition or theft of any communication service or to receive, intercept, disrupt, transmit, re-transmit, decrypt, acquire or facilitate the receipt, interception, disruption, transmission, re-transmission, decryption or acquisition of any communication service without the express consent or express authorization of the communication service provider as stated in a contract or otherwise, or as otherwise expressly authorized by law; or

(2) Modify, alter, program or reprogram a communication device designed or adapted, or which is used, for the purposes prohibited in subsection (a)(1) above;

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(3) Possess, use, manufacture, assemble, develop, distribute, import into this state, license, transfer, sell, lease or offer, promote or advertise for sale, use, lease or distribution any unlawful access device;

(4) Distribute, possess with intent to distribute, sell, give, transfer or offer, promote or advertise for sale, use or distribution any:

(A) Plans or instructions for making or assembling any unlawful communication or unlawful access device under circumstances evincing an intent to use or employ the communication or unlawful access device, or to allow the same to be used or employed, for the purpose of committing an offense under this section or assisting others in doing so with the intent to defraud a communication service provider; or

(B) Material, including hardware, cables, tools, data, computer software or other information or equipment, knowing that the purchaser or a third person intends to use the material in the manufacture, development or assembly of a communication or unlawful access device in violation of this section;

(5) Publish the number or code of an existing, cancelled, revoked or nonexistent telephone number, credit number or other credit device, or method of numbering or coding which is employed in the issuance of telephone numbers, credit numbers or other credit devices with knowledge or reason to believe that it may be used to avoid the payment of any lawful telephone or telegraph toll

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charge under circumstances evincing an intent to have the telephone number, credit number, credit device or method of numbering or coding so used; or

(6) Knowingly assist others in committing any of the acts prohibited by this section.

(b) Any communication or unlawful access device, plans, instructions or publications described in this section may be seized under warrant or incident to a lawful arrest for a violation of this section. Upon the conviction of a person for a violation of this section, the court may order the sheriff of the county in which the person was convicted to destroy as contraband or to otherwise lawfully dispose of the communication or unlawful access device, plans, instructions or publications which have been seized by law enforcement officers or are in the defendant's possession or control at the time of conviction.

(c) As used in this section, unless the context otherwise requires:

(1) "Communication device" means any type of electronic mechanism, transmission lines or connections and appurtenances thereto, instrument, device, machine, equipment, technology or software that is capable of intercepting, transmitting, re-transmitting, acquiring, decrypting, encrypting or receiving any communication service, including the receipt, acquisition, interception, transmission, re-transmission or decryption of any communication service provided by or through any cable television, fiber optic, telephone, electric power lines, satellite, microwave, data transmission, radio, Internet-based or wireless distribution network, system or facility, and components thereof, including any

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computer circuit, splitters, connectors, switches, communication security hardware and software, transmission hardware, security module, smart card, software, computer chip, electronic mechanism or any component, accessory or part of any communication device which is capable of facilitating the interception, transmission, re-transmission, decryption, acquisition or reception of any communication service;

(2) "Communication service" means any service lawfully provided for a charge or compensation paid by the recipient of such service to facilitate the lawful origination, transmission, emission or reception of signs, signals, data, writings, images and sounds or intelligence of any nature by telephone, including cellular or other wireless telephones, wire, wireless, radio, electromagnetic, photoelectronic or photo-optical systems, networks or facilities; and any service lawfully provided to a recipient of such service for a charge or compensation by any radio, telephone, photo-optical electromagnetic, photoelectronic, electric power, fiber optic, cable television, satellite, microwave, data transmission, wireless or Internet-based distribution system, network or facility, including, but not limited to, any and all electronic, data, video, audio, Internet access, telephonic, microwave and radio communications, transmissions, signals and services, and any such communications, transmissions, signals and services lawfully provided directly or indirectly by or through any of the aforementioned systems, networks or facilities;

(3) "Communication service provider" means:

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(A) Any person or entity providing any lawful communication service, whether directly or indirectly as a reseller, including, but not limited to, a cellular, paging or other wireless communications company or other person or entity which, for a fee, supplies the facility, cell site, mobile telephone switching office or other equipment or communication service;

(B) Any person or entity owning or operating any fiber optic, photo-optical, electromagnetic, photoelectronic, cable television, satellite, Internet-based, telephone, wireless, microwave, data transmission or radio distribution system, network or facility; and

(C) Any person or entity providing any lawful communication service directly or indirectly by or through any such distribution systems, networks or facilities.

(4) "Multipurpose device" means any communication device that is capable of more than one (1) function, and includes any component thereof, and includes plans or instructions for making, assembling or developing such a device or any component thereof.

(5) "Unlawful access device" means any type of instrument, device, machine, equipment, technology or software which is primarily designed, developed, assembled, manufactured, sold, distributed, possessed, used or offered, promoted or advertised, for the purpose of defeating or circumventing any effective technology, device or software, or any component or part thereof,

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used by the provider, owner or licensee of any communication service or of any data, audio or video programs or transmissions, to protect any such communication, data, audio or video services, programs or transmissions from unauthorized receipt, acquisition, interception, access, decryption, disclosure, communication, transmission or re-transmission.

(d) This section shall not be construed to impose any civil or criminal liability upon any:

- (1) State or local law enforcement agency,
- (2) State or local government agency, municipality, or authority; or
- (3) Communication service provider, unless such entity is acting

knowingly and with the intent to defraud a communications service provider as defined in this section. The statutory inference in subsection (f) of this section shall not apply to establish intent to defraud for purposes of this subdivision.

(4) Any financial institution subject to the provisions of Title V of the Gramm-Leach-Bliley Act of 1999 (Public Law 106-102), or the U.S.A. Patriot Act (PL 107-56), lawfully acting in that capacity.

(e)

(1) A violation of this section may also be punished as a theft of service as provided in § 39-14-104 or as a theft of cable television service as provided in § 7-59-109.

(2) A violation of this section involving five (5) or more communication or unlawful access devices is a Class D felony.

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(3) Any other violation of this section is a Class B misdemeanor.

(4) For purposes of all criminal penalties established for violations of this section, the prohibited activity established herein as it applies to each communication or unlawful access device shall be deemed a separate offense. For violations of this section involving one (1) communication or unlawful access device, each day a person is in violation of this section also constitutes a separate offense.

(5) For purposes of imposing fines upon conviction of a defendant for a violation of this section, all fines may be imposed as authorized by law for each communication or unlawful access device involved in the violation and for each day a defendant is in violation of this section.

(6) The court shall in addition to any other sentence authorized by law, order a person convicted of violating this section to make restitution for the offense.

(7) An offense under this section may be deemed to have been committed at either the place where the defendant manufactures, develops or assembles a communication or unlawful access device or assists others in doing so, or the places where the communication or unlawful access device is sold or delivered to a purchaser or recipient. It shall be no defense to a violation of this section that some of the acts constituting the violation occurred outside of the state of Tennessee.

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(f) In any criminal prosecution or civil action under this section, any of the following shall create an inference that the defendant intended to violate this section:

(1) The presence of an unauthorized connection of any kind between the defendant's property and any network, system or facility owned or operated by a communication service provider; or

(2) The defendant's possession of five (5) or more communication or unlawful access devices for any purpose prohibited by this section.

Where a communication service provider notifies the defendant in writing of the circumstances described in subparagraph (1)) above and the same circumstances are found to exist within a reasonable time thereafter, an inference shall be created that the defendant acted willfully in violation of this section.

(g) Civil actions.

(1) Any person aggrieved by a violation of this section may bring a civil action in any court of competent jurisdiction.

(2) The court may:

(A) Award declaratory relief and other equitable remedies, including preliminary and final injunctions to prevent or restrain violations of this section;

(B) At any time while an action is pending, order the impounding, on such terms as it deems reasonable, of any communication or unlawful access device that is in the custody or control of the violator and that the

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court has reasonable cause to believe was involved in the alleged violation of this section;

(C) Award damages as described in subsection (4) below; and

(D) As part of a final judgment or decree finding a violation of this section, order the remedial modification or destruction of any communication or unlawful access device, or any other devices or equipment involved in the violation, that is in the custody or control of the violator, or has been impounded under subparagraph (ii) above.

(3) The court may award reasonable attorney's fees and costs, including, but not limited to, costs for investigation, testing and expert witness fees, to a party who prevails.

(4) Damages awarded by a court under this section shall be computed as either of the following:

(A) Upon election of such damages at any time before final judgment is entered, the complaining party may recover the actual damages suffered by such party as a result of violations of this section and all profits of the violator that are attributable to all violations of this section and are not taken into account in computing the actual damages. Actual damages include the retail value of all communication services to which the violator had unauthorized access as a result of the violation, and the retail value of any communication services illegally available to those persons to whom the violator directly or indirectly provided or

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distributed any communication or unlawful access devices. In proving actual damages, the complaining party shall be required to prove only that the violator manufactured, distributed or sold any communication or unlawful access devices, but shall not be required to prove that those devices were actually used in violation of this section. In determining the violator's profits, the complaining party shall be required to prove only the violator's gross revenue, and the violator shall be required to prove his deductible expenses and the elements of profit attributable to factors other than the violation; or

(ii) Upon election by the complaining party at any time before final judgment is entered, that party may recover in lieu of actual damages and the violator's profits, an award of statutory damages of between one thousand five hundred dollars (\$1,500) to ten thousand dollars (\$10,000) for each communication or unlawful access device involved in the action and for each day the defendant was in violation of this section, with the amount of statutory damages to be determined by the court, as the court considers just.

(5) In any case where the court finds that any violation of this section was committed willfully and for purposes of commercial advantage or private financial gain, the court in its discretion may increase the total award of any damages awarded under subparagraphs (4)(i) or (ii) above, by an amount of not more than fifty thousand dollars (\$50,000) for each communication or unlawful access

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device involved in the action and for each day the defendant was in violation of this section.

(h) A person that manufactures, produces, assembles, designs, transfers, imports into this state, sells, distributes, licenses, leases, develops or offers, promotes or advertises for sale, use or distributing a multipurpose device, or possesses the same for any of the aforementioned purposes, shall not be in violation of this section unless that person acts knowingly and with an intent to defraud a communication service provider and the multipurpose device:

(1) Is manufactured, developed, assembled, produced, designed, distributed, sold or licensed for the primary purpose of committing a violation of this section;

(2) Has only a limited commercially significant purpose or use other than as an unlawful access device or for the commission of any other violation of this section; or

(3) Is marketed by that person, or another acting in concert with that person with that person's knowledge, for use as an unlawful access device or for the purpose of committing any other violation of this section.

The statutory inference under subsection (f) shall not establish intent to defraud for purposes of this subsection.

(i) No person shall be in violation of this section for using a communications device for the purpose of connecting one (1) or more multipurpose devices at the person's residential or business premises, provided that the person does not do so

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knowingly and with the intent to defraud a communication service provider, and that such device does not cause electronic or physical harm to the communication service provider's network, system or facility.

(j) Nothing in this section shall require that the design of, or design and selection of parts, software code, and/or components for, a communication device provide for a response to any particular technology, device or software, or any component or part thereof, used by the provider, owner or licensee of any communication service or of any data, audio or video programs or transmissions, to protect any such communication, data, audio or video service, programs or transmission from unauthorized receipt, acquisition, interception, access, decryption, disclosure, communication, transmission or re-transmission.

SECTION 2. This act shall take effect July 1, 2003, the public welfare requiring it.